Filed 12/21/09 In re V.M. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re V.M. et al., Persons Coming Under the Juvenile Court Law.	B216693 (Los Angeles County Super. Ct. No. CK66180)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. P.C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Stephen Marpet, Commissioner. Affirmed.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Senior Associate County Counsel, for Plaintiff and Respondent.

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P.C. (Mother) appeals from June 9, 2009 orders denying her petition for modification and terminating parental rights to her three children, V.M. (born in Sept. 2000), M.C. (born in July 2003), and A.C. (born in April 2005). We affirm the orders because no abuse of discretion is shown with respect to the denial of the petition for modification and substantial evidence supports the juvenile court's finding that the beneficial relationship exception to termination of parental rights under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i) did not apply.[1]

BACKGROUND

The children were detained from Mother and J.C. (Father) and placed in foster care in January 2007 because of the parents' current use of methamphetamine, unsafe and unsanitary home, and history of domestic violence in the presence of the children. The children lived in two different foster homes in California until October 2007, when they were placed with the paternal grandparents in Wisconsin, who are their legal guardians and prospective adoptive parents.[2]

At the detention hearing in January 2007, the Los Angeles County Department of Children and Family Services (DCFS) was ordered to arrange for Mother to drug test on demand. Mother was afforded monitored visits three times per week. After complaining to the police in January 2007 that Father had hit her in the head and kicked her in the legs and back, in February 2007 Mother denied to DCFS that Father physically assaulted her. Notwithstanding a February 2007 juvenile court restraining order requiring Father to stay 100 yards away from Mother, DCFS reported in May 2007 that Mother associated with

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[1] Unspecified statutory references are to the Welfare and Institutions Code.

[2] The paternal grandparents are the parents of Father, who is the presumed father of the two younger children. After being convicted of burglary, Father was deported to Guatemala in January 2009.

V.M.'s father, J.M., lived with Mother and V.M. when V.M. was an infant. J.M. had not seen V.M. in many years, appeared in the proceedings only shortly before the permanency planning hearing in 2009, and was not opposed to the plan of adoption by the paternal grandparents.

Father on numerous occasions and accompanied him on visits to the children. In May 2007, the court ordered Mother to submit to random drug testing once per week.

In October 2007, DCFS reported that Mother completed an eight week parenting course in June 2007 and was in a support group for battered wives, but Mother was not drug testing, having tested on only four occasions out of 20 demands to test between November 2006 and September 2007. Mother was living with Father and their visits with the children were inconsistent. Of the 26 scheduled visits in July through September, Mother attended only nine.

On October 5, 2007, the juvenile court sustained a second amended petition, declaring the children dependents pursuant to section 300, subdivisions (a) (serious physical harm), based on the parents' violent altercations in the children's presence, and (b) (failure to protect), based on the parents' domestic violence, unsanitary and unsafe home, and current use of methamphetamine. The court approved placement of the children with the paternal grandparents in Wisconsin and the children moved to Wisconsin on October 6, 2007. The court ordered that the parents were not to live in the paternal grandparents' home and the grandparents were not to monitor Mother's visits. Mother was ordered to attend individual counseling, including domestic violence counseling, and weekly random drug testing.

On October 17, 2007, Mother tested positive for methamphetamine. In December 2007, the parents were arrested for burglary. Mother was convicted and sentenced to 30 days in jail. According to Mother, she telephoned the children regularly from October 2007 to January 2008, when Mother moved to Wisconsin. For about three months, Mother lived in the basement of the paternal grandparents' home and saw the children on a daily basis; Mother claimed to have had unmonitored contact with the children during this time. But after Mother moved to her own apartment in May or June 2008, her visits tapered off to about three times per week because of her work schedule and domestic violence classes. Because of outstanding warrants in California, Mother spent three weeks in jail in Wisconsin in April 2008. According to the paternal grandmother, Mother left Wisconsin and returned to California in October 2008 without saying good-bye to the

children. But Mother telephoned the children almost every day after she returned to California.

In February 2008, the juvenile court found that the parents were not in compliance with the case plan and terminated reunification services. In June 2008, the paternal grandparents were appointed the children's legal guardians, and in October 2008 they expressed an interest in adopting them. DCFS's December 19, 2008 status review report stated that the children were thriving in the paternal grandparents' home and were "very happy, outgoing and social." The children did not talk about Mother, and V.M. had a negative reaction to seeing Mother in July. Mother wrote a letter to V.M., stating that Mother was working hard to have V.M. live with her. The paternal grandmother reported that Mother made false promises to all the children about visitation and regaining custody; the paternal grandmother admonished Mother not to make these type of promises, which gives the children false hope and causes them disappointment and behavioral problems. But by December 2008, the children had made significant progress behaviorally and appeared to understand and accept that Mother does not follow through on most of what she tells the children.

At the hearing in December 2008, the juvenile court noted that DCFS was recommending that the permanent plan be changed from guardianship to adoption and set a permanent plan hearing. An April 17, 2009 status review report stated that Mother planned to enroll in the Tarzana Treatment Centers so that she could get her children back; Mother was attending counseling three times per week and drug testing twice a month. V.M. told a social worker in February 2009 that she wanted to continue living with the paternal grandparents and felt good about them adopting her. The other two children were too young to make a meaningful statement about the matter of adoption.

According to the April 17, 2009 section 366.26 report, Mother telephoned the children during a home visit by a Wisconsin social worker in February 2009; as the telephone call was routed through the paternal grandparents' computer, the social worker was able to listen to the conversations. The children became bored and did not have

much to say to Mother, who kept repeating her questions. V.M. challenged things that Mother said.

The paternal grandparents and the children came to California for the April 17, 2009 court date, and Mother visited with the children at that time. At the conclusion of the April 17 hearing, the juvenile court ordered a supplemental report by DCFS and stated that the social worker was to be on call for the contested section 366.26 hearing set for June 9, 2009.

On May 21, 2009, Mother filed a petition for modification (section 388), requesting termination of the guardianship and the return of the children to her custody, or in the alternative, reinstatement of reunification services and unmonitored visitation. The petition was supported by Mother's declaration and attached exhibits showing that in January 2009 Mother began attending counseling, including drug counseling, and random drug testing, with all test results being negative. Mother also was enrolled in an outpatient treatment program at Tarzana Treatment Centers and was expected to complete the program on June 5, 2009. Mother declared that she had established a sober support system and had a recovery sponsor. From March to May 2008, while in Wisconsin, Mother participated in an individual counseling program for victims of domestic violence. Mother further declared that when she lived in Wisconsin, she visited her children regularly; she moved back to California because she could no longer afford the prohibitive cost of random testing and counseling in Wisconsin. Mother dearly loved her children and spoke with them on a daily basis when allowed by the legal guardians. In that way, Mother kept up with the children's activities and interests.

DCFS's June 9, 2009 addendum report contained information that Mother successfully completed her outpatient program at Tarzana Treatment Centers on June 5, 2009; her last drug test was on May 27, 2009, and the results were negative for drugs.

At the outset of the hearing on June 9, 2009, Mother's attorney stated that Mother hoped that the court would grant her a hearing on her section 388 petition and stated, "We did ask that the worker be present today, and Mother would be asking for a continuance to have that worker here anyway . . . ." The court denied Mother a hearing

on her petition, stating that "it is not in the minors' best interest to grant this matter for hearing today."

The court then proceeded to the permanency plan hearing. Mother's attorney stated, "I'm asking for a continuance, Your Honor. The worker is not present." The court asked Mother's attorney for the basis for the continuance other than the absence of the social worker, stating that the issue is "whether or not Mother can provide evidence that she has come within one of the exceptions under the Welfare and Institutions Code."

Mother's attorney then stated that Mother was "prepared to give evidence on this. I want the worker here so I can question the worker." The juvenile court asked what Mother has done that would come within one of the exceptions to termination of parental rights. Mother's attorney then explained the factual basis for Mother's beneficial relationship exception to termination of parental rights but did not explain what evidence any social worker could provide on that exception. Mother's attorney asked to take some evidence on that issue. The court responded, "We can certainly hear testimony," and asked if Mother wanted to take the stand, which she did.

Mother testified that after she returned to California, there was a breakdown in her relationship with the paternal grandmother. Mother stated that she had completed all of the court-ordered programs, although "it took me a while to get on my feet . . . ." Mother stated that she sent her children boxes of gifts for their birthdays; she loved her children and would do anything, including continued drug testing and "counseling for the rest of my life . . . . I have no problem with that at all. They are my babies, and I want them back."

On cross-examination, Mother denied telling the children that they were going to come home to her. After the court admitted the reports offered into evidence by DCFS, and after DCFS rested, the court asked if Mother had any further witnesses. Mother's attorney stated, "No further witnesses, Your Honor."

After argument, the juvenile court terminated parental rights, after it found that Mother had not established the beneficial relationship exception under section 366.26, subdivision (c)(1)(b)(i). The court explained, "I'm faced with whether or not your

relationship with your children has risen to the level of being an active parent in their lives, taking them to school, taking them to their doctors, going to their soccer games, helping them with their homework, and, unfortunately, for the last — since November, at least, since last year, you haven't seen them, and that is my legal basis upon which to ever give you any exceptions. [¶] . . . [¶] And it is very difficult, but I must find, based upon the evidence before me, that the relationship with your children at this time does not rise to the level of a [section 366.26, subdivision (c)(1)(B)(i)] exception, that your visitation with the children has been nothing but monitored and by phone contact since October of last year."

Mother appealed from the June 9, 2009 orders terminating parental rights and denying her section 388 petition without a hearing.

DISCUSSION

A. Petition for Modification

"The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing [Citation.]' [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

The juvenile court may deny the petition ex parte if it "fails to state a change of circumstance or new evidence that may require a change of order . . . or that the requested modification would promote the best interest of the child" (Cal. Rules of Court, rule 5.570(d)), but the court may grant the petition if it "states a change of circumstance or new evidence and it appears that the best interest of the child may be promoted by the proposed change of order" (*id.*, rule 5.570(e)).

"In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.* (2004)

123 Cal.App.4th 181, 189.) "Moreover, in reviewing the juvenile court's determination, we bear in mind the fact that, '[i]n any custody determination, a primary consideration in determining the child's best interests is the goal of assuring stability and continuity. [Citation.] "When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child." [Citations.] [¶] . . . [¶] After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point "the focus shifts to the needs of the child for permanency and stability" [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.' [Citation.]" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

We review the summary denial of the petition for abuse of discretion. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.)

Mother fails to establish that the juvenile court abused its discretion in denying her a hearing on her petition because there was no evidence to support her assertion that a change of order might promote the children's best interests. At the time Mother filed her petition, the children had not been living with her for over two years. They had been living with the paternal grandparents in another state for the last 20 months, and their physical contact with Mother between October 2008 and June 2009 was minimal. Given Mother's recent completion of her outpatient program and the children's need for permanency and stability, the juvenile court did not abuse its discretion in impliedly determining that the children's placement with the paternal grandparents with a plan of adoption was better able to satisfy their needs and thus in their best interests. The court did not abuse its discretion in concluding that there was an insufficient showing of "how the best interests of these young children would be served by depriving them of a

permanent, stable home in exchange for an uncertain future" with Mother. (*In re C.J.W.*, *supra*, 157 Cal.App.4th at p. 1081.)

B. Section 366.26 Hearing

Mother claims the juvenile court erred or abused its discretion in (1) denying her request for a continuance for the presence of the social workers, (2) denying her a due process right to cross-examine the social workers who prepared the reports the court received into evidence, and (3) applying the wrong standard with respect to the beneficial relationship exception by considering only her physical contact with the children and not all of the evidence pertaining to her relationship with them, including the substance of her telephone conversations with the children.

We conclude that the juvenile court did not err or abuse its discretion in denying a continuance to allow for the presence of the social workers because, upon the court's request for an explanation of the basis for Mother's beneficial relationship exception to the termination of parental rights, that is for an offer of proof, Mother failed to articulate how the testimony of a social worker would have been pertinent to that exception. A court may require an offer of proof on an issue, like an exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i), where the parent has the burden of proof. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 732, 734, fn. 4 (*Thomas R.*); see also *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1119 [no violation of due process to require an offer of proof before setting a contested hearing on whether parent can meet burden of establishing statutory exception to termination of parental rights].) Here, because Mother's offer of proof was inadequate to show how the social workers' testimony would support her beneficial relationship exception to termination of parental rights, the trial court did not err in refusing to continue the hearing for such testimony.

We also disagree with Mother's assertion that the denial of an opportunity to cross-examine the social workers who prepared the reports constituted a denial of due process. "Different levels of due process protection apply at different stages of dependency proceedings. [Citations.] After reunification services are terminated and a section 366.26 hearing is set the focus shifts from the parent's interest in reunification to

the child's need for permanency and stability. [Citation.] For this reason, we agree that cases holding a parent has an unfettered due process right to confront and cross-examine adverse witnesses at contested hearings held before the permanency planning stage do not compel the identical conclusion with respect to the section 366.26 hearing." (*Thomas R., supra,* 145 Cal.App.4th at p. 733, fn. omitted.) Thus, in particular circumstances, a parent has a due process right at the section 366.26 hearing to cross-examine a social worker and controvert the contents of a report "*if it is relevant to the issues before the court*." (*Id.* at p. 733.)

Here, Mother's briefs identify only two statements in two DCFS reports that Mother wanted to challenge, and both of those statements were made to DCFS by the paternal grandmother. Mother contends that the paternal grandmother's statements (about Mother's visits tapering off and the paternal grandparents' lack of knowledge of Mother's address) were incorrect, and Mother so testified. But she claims she also should have been allowed to call and cross-examine the social workers who prepared the reports.[3] But cross-examination of the social workers would not have resolved the conflict in the statements between Mother and the paternal grandmother. Mother fails to explain how cross-examination of the social workers would have provided any evidence relevant to the issue of whether Mother or the paternal grandmother was more credible. Accordingly, Mother has not established that the denial of an opportunity to cross-examine the social workers violated her due process rights.

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[3] Mother cites to her following testimony on cross-examination by counsel for DCFS: "Q And in that report, it indicates that the grandmother didn't know where you were staying or how long you were going to be in Wisconsin. [¶] A That is incorrect. [¶] . . . [¶] Q . . . In that report, the paternal grandmother had indicated that your visits with the children had tapered off even though you were living only one mile from her home and rarely visited much. [¶] Do you disagree with that report as well? [¶] A Yes, I do. And I think she contradicted herself stating that she didn't know where I was and if I was going to be leaving any time soon, but then she states that I'm less than a mile away. She knew exactly where I was, and I visited the kids regularly."

"The standard of review where a parent is deprived of a due process right is whether the error was harmless beyond a reasonable doubt." (*Thomas R., supra*, 145 Cal.App.4th at p. 734.) Assuming for purposes of argument that it was error to deny Mother a right to cross-examine the social workers, the error was harmless beyond a reasonable doubt because Mother testified as to the frequency of her visitation in Wisconsin, and it is not established that the social workers in California had any personal knowledge regarding that issue. Mother fails to show that any error was not harmless under the circumstances of this case.

Mother asserts that the juvenile court applied the wrong standard by focusing on Mother's limited physical contacts with the children after she returned to California in October 2008 and by not allowing her to "fully testify regarding her relationship with her children." Here, Mother appears to challenge the juvenile court's sustaining of some evidentiary objections to questions about the content of her telephone conversations with the children and the children's responses. But Mother fails to discuss the specific objections and to cite any legal authority showing that an objection was erroneously sustained, so Mother fails to show the court committed any error in ruling on objections to questions asked of her during her testimony. We also conclude that Mother fails to support her assertion that the juvenile court misapplied or misunderstood the law.

Finally, we reject Mother's argument that the juvenile court "did not have sufficient evidence to make a proper determination regarding the exception in section 366.26, subd. (c)(1)(B)(i)." A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parent has the burden of establishing this exception. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) Because it was up to Mother to provide evidence to establish the exception, the juvenile court cannot be faulted for lack of sufficient evidence.

DISPOSITION

The orders of June 9, 2009, are affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.